

cautions against imposition of an overly rigid or binding requirement. A complainant may not be in a position to provide fully detailed or definitive damage calculations prior to receipt of the defendant's answer or the completion of discovery. Hence, a complainant should be deemed to have satisfied this requirement to the extent that it has provided a good faith calculation based upon the evidence then available to it and should be permitted to amend its complaint to reflect updated damage calculations.

TRA supports the remaining procedural recommendations set forth in the Notice with respect to the determination and award of damages in formal complaint proceedings. TRA agrees that the interests of the parties to a formal complaint proceeding would be well served by structuring a limited interim period following a finding of liability in which settlement discussions could be held or resort could be made to a voluntary dispute resolution mechanism.⁶⁴ TRA further concurs in the Notice's proposal to create a mechanism by which damage issues could be referred to an administrative law judge for hearing and resolution following this limited interim "cooling-off" period.⁶⁵ And TRA agrees that a defendant, if adjudged liable, should be required to place some percentage of claimed damages in escrow pending resolution of the damages issue.⁶⁶

⁶⁴ Id. at § 67.

⁶⁵ Id. at § 68.

⁶⁶ Id. at § 69.

I. Cross-Complaints and Counterclaims (§§ 70 - 71)

TRA endorses the limitations the Notice proposes to impose on cross-complaints and counterclaims. Specifically, TRA agrees that counter-claims arising out of the same transaction or occurrence that is the subject matter of the complaint must be filed with a defendant's answer or be forever barred as to the complainant, while all other counter-claims must be filed concurrently with the defendant's answer to be aired in the complaint proceeding, but would not be barred if filed in a later proceeding.⁶⁷

J. Replies (§§ 72 - 73)

TRA agrees with the Commission that replies to defendants' answers should be permitted only upon a good cause showing.⁶⁸ Such a showing could be predicated on a demonstration that the defendant had misrepresented pertinent facts in its answer or that additional facts were necessary to evaluate defendant's affirmative defenses.

K. Motions (§§ 74 - 78)

TRA wholeheartedly supports the Commission's efforts to eliminate unnecessary pleadings from the formal complaint process. TRA, accordingly, endorses the Notice's proposal to require moving parties to certify that they have made a good faith effort to resolve the dispute which is subject matter of the motion before filing the motion with the Commission. TRA also agrees with the Commission that motions to make the complaint "definitive and certain" should

⁶⁷ Id. at § 70.

⁶⁸ Id. at § 72.

no longer be necessary and that timetables for responding to motions must be shortened if statutory deadlines are to be met.⁶⁹ TRA cautions the Commission, however, against adoption of an overly broad rule against amendment of complaints, primarily because of the circumstances discussed above in which a complainant does not have alternate access to information in the possession of a defendant and may need to amend its complaint once it has obtained such information through defendant's answer or discovery responses.

L. Other Required Submissions (§§ 80 - 83)

TRA supports the Notice's proposal to require submission of a joint statement of stipulated facts and key legal issues within five days following the filing of defendant's answer.⁷⁰ TRA opposes, however, the suggestion that the parties be denied the opportunity to file briefs in any proceeding.⁷¹ Complainants in particular would be disadvantaged if forced to rely exclusively on their complaints without the opportunity to respond to defendants' defenses. Nor can TRA support the imposition of limits on the scope of briefs.⁷² Parties should not be denied the right to structure and argue their cases as they see fit. TRA would not, however, oppose page limits for briefs, or short briefing schedules designed to facilitate prompt resolution of complaints.⁷³

⁶⁹ Id. at §§ 75 - 77.

⁷⁰ Id. at § 80.

⁷¹ Id. at § 81.

⁷² Id.

⁷³ Id. at §§ 82 - 83.

M Sanctions (¶¶ 84 - 85)

TRA advocates strong sanctions for willful refusals to comply with the procedures adopted by the Commission to facilitate expeditious and equitable resolution of formal complaints. TRA submits that sanctions within the complaint process will be that much more effective if they alter the outcome of the complaint proceeding in which the sanctionable action occurs. Hence, complaints should be dismissed for noncompliance with the pleading rules (subject to the concerns noted by TRA above) and summary judgment should be entered against defendants whose answers do not satisfy Commission requirements. Failures to respond to discovery in a timely and/or complete manner should result in judgments against the offending party, either on individual issues or as to the matter as a whole. Pleadings designed simply to delay or disrupt the proceeding should produce like penalties. The Commission must be a strict taskmaster if the demanding deadlines established by Congress for the resolution of formal complaints are to be met.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with TRA's comments herein.

Respectfully submitted,

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